

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
October 14, 2009 Session

**IN THE MATTER OF: B. L. C. ET AL.**

**Appeal from the Juvenile Court for Sumner County  
No. 2006JV212     Barry R. Brown, Judge**

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**No. M2009-01187-COA-R3-PT - Filed November 4, 2009**

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Mother appeals the termination of her parental rights. She contends the trial court erred in finding that her rights should be terminated on the ground of substantial noncompliance with the requirements of the permanency plan and that termination was in the children's best interests. She also contends the Department of Children's Services did not act in good faith to use reasonable efforts to assist her in reuniting with her children. We have determined that the evidence clearly and convincingly supported the finding of substantial noncompliance with the permanency plan, that termination was in the best interests of the children, and that the Department used reasonable efforts to assist Mother in reuniting with her children. Therefore, we affirm the termination of Mother's parental rights.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Affirmed**

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which ANDY D. BENNETT and RICHARD H. DINKINS, JJ., joined.

Randy P. Lucas, Gallatin, Tennessee, for the appellant, C. K.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; and Elizabeth C. Driver, Senior Counsel, Tennessee Department of Children's Services.

W. Brian Stephens, Gallatin, Tennessee, Guardian ad litem.

**OPINION**

This is an appeal from the termination of Mother's rights to her children.<sup>1</sup> The children were taken into the Department of Children's Services' ("the Department") custody on December 21, 2005 following allegations of dependency and neglect stemming from Mother and Father's abandonment of the children with their grandparents. On September 29, 2006, the Department filed

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<sup>1</sup> The termination was to Mother's three boys, however, tragically, one child died after the trial court's decision and, therefore, the appeal now applies to two children.

a petition to terminate the parental rights of both Mother and Father, and, following a trial in April of 2007, the trial court terminated both parents' rights. An appeal to this court followed. During the pendency of the appeal, the children were placed in a pre-adoptive placement, where they have remained since. In December 2007, this court overturned the termination of Mother's rights. The termination of Father's rights was affirmed.

Following this court's decision in the first appeal, the Department renewed its efforts to assist Mother. The Department assigned Deana Ferguson as Mother's caseworker, and on May 12, 2008, a Child and Family Team Meeting was held, at which a permanency plan was devised and explained to Mother.<sup>2</sup> Under the plan, Mother was required to remain free from illegal drugs, use prescription drugs as directed, use alcohol responsibly, and meet her mental health needs by having a psychological evaluation. She was also required to have stable housing and a legal means of income. The plan addressed her children by requiring that she effectively parent her children by obtaining a parenting assessment, interacting with the children in an age-appropriate manner and developing a relationship with them, and being able to provide transportation for the children. To assist Mother in completing the requirements, Mother's caseworker, Ms. Ferguson, set up services for Mother with various providers, and arranged for Mother's alcohol and drug assessment and her psychological evaluation.

The Department also reinstated visitation between Mother and the children. A no-contact order that had previously barred Mother from visiting with the children was lifted, and on June 25, 2008, Mother was allowed visitation with the boys for the first time in over three years. Visitation was scheduled to occur every other week on Sundays, so that the boys could meet with their therapist on the following day. The foster parents were allowed to be present at the visitation, but did not participate. Additionally, the Department hired Cheryl McAdams to supervise the visits and aid Mother in her interactions with the children.<sup>3</sup> Ms. McAdams worked with Mother over seven months, during which she found that Mother made no real progress in her parenting skills. Mother failed to follow through on discipline and engaged in inappropriate activities with the boys. Ms. McAdams attempted to help by providing games to engage all of the children, but Mother ignored these.

The Department also hired Regina Watkins, a homemaker services worker from Mid-Cumberland Human Resources Agency, to assist Mother in meeting the requirements of the permanency plan. Her objectives were to help Mother obtain suitable housing and employment, help Mother develop a family budget, gain stronger parenting skills, and build positive social relationships. When Ms. Watkins first began working with Mother, she was residing with her former

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<sup>2</sup>The Department actually created three separate, but identical, permanency plans, one for each child. Since all three plans were identical in substance, we will refer throughout the opinion to one plan. The plans were ratified by the trial court on June 18, 2008.

<sup>3</sup>Ms. McAdams held a master's degree in counseling, was in the process of obtaining her doctorate, and had over eight years of experience in therapeutic visitation services with children in Department custody or at risk of entering custody.

in-laws, the children's paternal grandparents, following her release from jail.<sup>4</sup> Mother had previously resided with her in-laws and during her first termination of parental rights trial, Mother had testified that she did not consider her in-laws to be a suitable home for her children, and, thus the Department told her custody would not be reinstated while she resided there. Ms. Watkins worked with Mother on obtaining her driver's license, and encouraged her to obtain employment and find housing. Once Mother had obtained a part-time job, Ms. Watkins worked with her on creating a budget and a plan for supporting herself.

Mary Magestro, a therapist at Vanderbilt Mental Health Center, was hired by the Department in March 2008 to counsel the boys in anticipation of visitation with Mother being reinstated. She continued to counsel them as visitation occurred. During the counseling, Ms. Magestro diagnosed one child with Depressive Disorder, and the two other boys with Anxiety Disorder. Over the course of the summer of 2008, Ms. Magestro observed the children's behavior becoming more severe. B.C. engaged in destructive behavior, and Ms. Magestro, concerned about the children's safety, arranged for Youth Villages to provide in-home services. Ms. Magestro felt that the boys would require therapy periodically throughout their lives, and that a stable, consistent, patient and loving home was necessary. Based on Ms. Magestro's recommendations, face-to-face visitation between Mother and the children was ended by a court order in February 2009, and twice-weekly telephone visits were instituted.

Despite these efforts and services provided to Mother, she failed to meet the deadline of August 12, 2008 for completion of the requirements in the first permanency plan, and, therefore, a second plan was developed with the requirement that she fulfill the previously specified tasks remaining.<sup>5</sup>

On November 7, 2008, the Department filed a petition to terminate Mother's parental rights on the grounds of substantial noncompliance with the requirements of the permanency plan and mental incompetency; however, at the start of the trial, the Department indicated that it would only pursue the ground of substantial noncompliance. The trial began on April 16, 2009, and continued sporadically over several days, concluding on May 4, 2009.

Mother was the first witness to testify at the trial. She stated that she had married in March 2008, and was living with her new husband in a mobile home, which would be suitable as a residence for the children. While she did not currently have employment, she claimed that her husband had enough income to support her and her three children. However, on the final day of trial, it was disclosed that Mother had obtained a divorce in January of 2009, and was living with a childhood friend whose last name she did not know.

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<sup>4</sup> While her case was on appeal to this court, Mother was convicted of the felony crime of accessory to selling illegal drugs, and was incarcerated from July 2007 until February 2008.

<sup>5</sup> This plan was ratified by the trial court on November 5, 2008.

On May 8, 2009, the trial court terminated Mother's parental rights on the ground of substantial noncompliance with the permanency plan. The trial court found that Mother had failed to comply with the requirements of having a stable residence and stable employment. The court found that Mother had only token employment and that Mother had resided in six to seven homes since her incarceration. The court found that these two conditions were extremely important as her children required stability in their lives and Mother's previous inability to care for the boys had resulted in their placement with the Department. The court also found that the Department had made reasonable efforts to assist Mother and that the termination of Mother's rights was in the children's best interests. Mother appeals.

#### ANALYSIS

Parents have a fundamental right to the care, custody and control of their children. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Hawk v. Hawk*, 855 S.W.2d 573, 577 (Tenn. 1993). This right is superior to the claims of other persons and the government, yet it is not absolute. *In re S.L.A.*, 223 S.W.3d 295, 299 (Tenn. Ct. App. 2006).

Parental rights may be terminated only where a statutorily defined ground exists. Tenn. Code Ann. § 36-1-113(c)(1); *Jones v. Garrett*, 92 S.W.3d 835, 838 (Tenn. 2002); *In re M.W.A.*, 980 S.W.2d 620, 622 (Tenn. Ct. App. 1998). The petitioner has the burden of proving that there exists a statutory ground for termination, such as abandonment or failing to remedy persistent conditions that led to the removal of the child. Tenn. Code Ann. § 36-1-113(c)(1); *Jones*, 92 S.W.3d at 838. Only one ground need be proved, so long as that ground is proved by clear and convincing evidence. See *In re D.L.B.*, 118 S.W.3d 360, 367 (Tenn. 2003). In addition to proving one of the grounds for termination, the petitioner must prove that termination of parental rights is in the child's best interest. Tenn. Code Ann. § 36-1-113(c)(2); *In re F.R.R.*, 193 S.W.3d 528, 530 (Tenn. 2006); *In re A.W.*, 114 S.W.3d 541, 544 (Tenn. Ct. App. 2003); *In re C.W.W.*, 37 S.W.3d 467, 475-76 (Tenn. Ct. App. 2000) (holding a court may terminate a parent's parental rights if it finds by clear and convincing evidence that one of the statutory grounds for termination of parental rights has been established and that the termination of such rights is in the best interests of the child). Therefore, a court may terminate a person's parental rights if (1) the existence of at least one statutory ground is proved by clear and convincing evidence and (2) it is clearly and convincingly established that termination of the parent's rights is in the best interest of the child. Tenn. Code Ann. § 36-1-113(c); *In re Adoption of A.M.H.*, 215 S.W.3d 793, 810 (Tenn. 2007); *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002).

Whether a statutory ground has been proved by the requisite standard of evidence is a question of law to be reviewed de novo with no presumption of correctness. *In re B.T.*, No. M2007-01607-COA-R3-PT, 2008 WL 276012, at \*2 (Tenn. Ct. App. Jan. 31, 2008) (no Tenn. R. App. P. 11 application filed) (citing *In re Adoption of A.M.H.*, 215 S.W.3d at 810).

### Substantial Noncompliance with the Permanency Plan<sup>6</sup>

Parental rights may be terminated upon the ground of substantial noncompliance by the parent with the statement of responsibilities in a permanency plan. Tenn. Code Ann. § 36-1-113(g)(2) (2005). When terminating a parent's rights on the ground of substantial noncompliance, the trial court must find that the requirements of the permanency plan that the parent allegedly did not satisfy are "reasonable and related to remedying the conditions which necessitate foster care placement." *In re Valentine*, 79 S.W.3d at 547 (quoting Tenn. Code Ann. § 37-2-403(a)(2)(C)). The issue of substantial noncompliance with the requirements of a permanency plan is a question of law; therefore, this court reviews it de novo with no presumption of correctness. *Id.* 546 (citing *Langschmidt v. Langschmidt*, 81 S.W.3d 741, 744-45 (Tenn. 2002)).

The requirements in Mother's permanency plan were directed at making Mother capable of supporting her children and providing a stable home for them. The children were originally placed in Department custody after they had been abandoned by their parents. The plan required Mother to obtain a psychological evaluation, due to concerns for her mental health, and an alcohol and drug assessment, because of her recent drug-related conviction. Additionally, the plan required Mother to obtain employment, stable housing, and transportation, all requirements that related to providing the children with stability. Additionally, Mother was required to be able to effectively parent her children, interact with her children in an age-appropriate manner, and develop a relationship with them. Mother did complete, as the trial court noted, several of the requirements in the permanency plan; she obtained her psychological evaluation, her drug and alcohol assessment, and had remained drug free. However, the requirements that addressed the conditions which had necessitated the children's placement with the Department, mainly Mother's inability to care for the children, had not been met. At the close of trial, following the disclosure that Mother was no longer married to the husband that she claimed would provide an income and home for her and her children, it was clear that Mother was still unable to provide for the children, as she had not complied with the requirements in the permanency plan that she have a stable home or a stable income. The trial court found that Mother had only token employment over the past months, and that she was currently unemployed. Mother did not have a stable home, and was currently residing with a childhood friend whose last name she did not know. She was relying on friends to provide her with groceries and basic necessities. The evidence in the record clearly supports the termination of Mother's rights on the ground of substantial noncompliance with the requirements of the permanency plan, and thus, we affirm the trial court's finding on this ground.

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<sup>6</sup>In her brief, Mother argues that the evidence did not support a finding that Mother's rights should be terminated pursuant to Tenn. Code. Ann. § 36-1-113(g)(3), which is the ground of persistent conditions. This ground was not pled or pursued at trial and it was not a ground for termination of Mother's rights. Instead, the Department sought termination of Mother's rights for the ground of substantial noncompliance with the requirements of the permanency plans set forth at Tenn. Code Ann. § 36-1-113(g)(2). Therefore, we have reviewed the trial court's findings concerning the ground of substantial noncompliance.

### Reasonable Efforts

Mother contends that the evidence in the record did not support a finding that the Department acted in good faith to use reasonable efforts to assist her in being reunited with her children. She contends that the Department was biased in that it had already placed the children in a pre-adoptive home and, therefore, “made a pretense” of providing reasonable efforts to assist her. We cannot agree.

The Department had the responsibility to exercise reasonable care and diligence to provide services reasonably necessary to assist Mother in fulfilling her obligations under the permanency plans. Tenn. Code Ann. § 36-1-113(c)(1); *In re Valentine*, 79 S.W.3d at 547; *In re C.M.M.*, 2004 WL 438326, at \*7-8. In that regard, the Department’s employees had an affirmative duty to utilize their education and training to assist Mother in a reasonable way to address the conditions that led to the children’s removal and to complete the tasks stated in the plan. *In re Giorgianna H.*, 205 S.W.3d at 518-19; *In re J.L.E.*, No. M2004-02133-COA-R3-PT, 2005 WL 1541862, at \*14 (Tenn. Ct. App. June 30, 2005). Although the Department bears the responsibility to make reasonable efforts toward reunification, the road to reunification is a “two-way street.” *State Dep’t of Children’s Servs. v. S.M.D.*, 200 S.W.3d 184, 198 (Tenn. Ct. App. 2006)). A parent desiring to be reunited with his child has a corresponding duty to “make reasonable and appropriate efforts to rehabilitate themselves and to remedy the conditions that required the Department to remove ” their child from custody. *In re A.R.*, No. W2008-00558-COA-R3-PT, 2008 WL 4613576, at \*16 (Tenn. Ct. App. Dec. 13, 2007) (quoting *In re Giorgianna H.*, 205 S.W.3d at 519). Accordingly, although the Department bears a responsibility to facilitate reunification, it does not bear the entire responsibility. *Id.* (citing *State Dep’t. of Children’s Servs v. S.M.D.*, 200 S.W.3d at 198).

Reasonable efforts are statutorily defined as the “exercise of reasonable care and diligence by the department to provide services related to meeting the needs of the child and the family.” Tenn. Code Ann. § 37-1-166(g)(1). The factors the courts are to use to determine reasonableness include: (1) the reasons for separating the parents from their children, (2) the parents’ physical and mental abilities, (3) the resources available to the parents, (4) the parents’ efforts to remedy the conditions that required the removal of the children, (5) the resources available to the Department, (6) the duration and extent of the parents’ efforts to address the problems that caused the children’s removal, and (7) the closeness of the fit between the conditions that led to the initial removal of the children, the requirements of the permanency plan, and the Department’s efforts. *In re Tiffany B.*, 228 S.W.3d 148, 158-59 (Tenn. Ct. App. 2007) (footnote omitted) (citing *In re Giorgianna H.*, 205 S.W.3d at 519).

We find that the evidence clearly supports the finding that the Department made reasonable efforts to assist Mother in fulfilling her obligations. Mother’s caseworker, Ms. Ferguson, arranged for her psychological evaluation and alcohol and drug assessment, which were required by the permanency plan. Additionally, the Department arranged for numerous services to be provided to Mother. Ms. Watkins provided homemaker services to Mother beginning in June of 2008, and continuing through January of 2009. The Department also hired Ms. McAdams, who attempted to

help Mother during her visits with the children; however, instead of utilizing Ms. McAdams as a resource to improve her interaction with the children, Mother would resist or ignore her advice.

Mother also contends that the Department did not make reasonable efforts in providing visitation. Mother contends that the amount of time was too insubstantial for her to be able to create a bond with the children. The visitation schedule was originally limited due to the significant period of time that had passed since Mother had last seen the children. Testimony at trial demonstrated that visitation was not increased because there was no improvement in the interaction between Mother and the children; in fact, as the visitations continued, the children grew increasingly disturbed. However, the Department indicated that had such improvement occurred additional visitation would have been granted.

After considering the above facts and the entire record, we find clear and convincing evidence that the Department made reasonable efforts to assist Mother in fulfilling her obligations under the permanency plan.

#### Best Interests of the Children

Under Tennessee Code Annotated § 36-1-113(i), the factors looked to in order to determine what is in the children's best interests are:

- (1) Whether the parent or guardian has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best interest to be in the home of the parent or guardian;
- (2) Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;
- (3) Whether the parent or guardian has maintained regular visitation or other contact with the child;
- (4) Whether a meaningful relationship has otherwise been established between the parent or guardian and the child;
- (5) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological and medical condition;
- (6) Whether the parent or guardian, or other person residing with the parent or guardian, has shown brutality, physical, sexual, emotional or psychological abuse, or neglect toward the child, or another child or adult in the family or household;

(7) Whether the physical environment of the parent's or guardian's home is healthy and safe, whether there is criminal activity in the home, or whether there is such use of alcohol or controlled substances as may render the parent or guardian consistently unable to care for the child in a safe and stable manner;

(8) Whether the parent's or guardian's mental and/or emotional status would be detrimental to the child or prevent the parent or guardian from effectively providing safe and stable care and supervision for the child; or

(9) Whether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to § 36-5-101.

Tenn. Code Ann. § 36-1-113(i)(1)-(9) (2005). The foregoing list is not exhaustive and the statute does not require that the trial court find every factor to apply in order to find that termination is in the children's best interest. *In re M.A.R.*, 183 S.W.3d 652, 667 (Tenn. Ct. App. 2005).

The trial court determined that termination of Mother's rights was in the children's best interest based upon several statutory factors. Mother had failed to make an adjustment of circumstances to make it safe for her children to return to her home. *See* Tenn. Code Ann. § 36-1-113(i)(1). Mother had no stable employment, nor did she have a stable residence. At the close of the trial, Mother was living with a woman whose last name she did not know, and was relying on others to support her. Clearly, she was not only unable to provide for herself, but also unable to provide for her children. Mother also had no meaningful relationship with the children. *See* Tenn. Code Ann. § 36-1-113(i)(4). The eldest child, B.C., was reluctant to interact with his mother, and following visitation being reinstated was increasingly aggressive and engaged in self-injurious behavior. The boys experienced such anxiety following the visitations that the date for visitation was changed so they could see their therapist on the following day, and eventually, the children's therapist recommended that face-to-face contact cease. All the boys experienced not only mental health challenges, but also physical conditions,<sup>7</sup> which would be impacted by a change in caretakers. *See* Tenn. Code Ann. § 36-1-113(i)(5). The boys had originally suffered from severe anxiety and night terrors when first placed with their foster family, but had vastly improved. However, any disruption in the children's routine resulted in anxiety for the boys, and their foster mother had quit her job in order to better take care of the children. While the children had no meaningful relationship with their Mother, they had bonded significantly with their foster parents, and referred to them as their parents.

The best interests of the children are to be determined from the perspective of the children rather than the parent, *see L.H.*, 2007 WL 2471500, at \*7 (citing *White v. Moody*, 171 S.W.3d 187, 194) (Tenn. Ct. App. 2004)), and we find that the evidence in the record clearly and convincingly

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<sup>7</sup> One child had serious kidney issues that stunted his growth. Another child had problems stemming from a skull fracture suffered in a car accident.



supports the trial court's finding that termination of Mother's parental rights was in the children's best interests. Thus, we affirm the trial court's finding on this issue.

#### **IN CONCLUSION**

The judgment of the trial court is affirmed, and this matter is remanded with costs of appeal assessed against the Department of Children's Services due to the Mother's indigency.

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FRANK G. CLEMENT, JR., JUDGE